A

SAMUNDEE DEVAN MUTHU KERISHNAN

v.

PP

B

FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
HASHIM YUSOFF FCJ
MOHD GHAZALI YUSOFF FCJ
[CRIMINAL APPEAL NO: 05-82-08(B)]

C

17 JUNE 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in heroin and monoacetylmorphines - Mens rea trafficking - Presumption under s. 37(da)(iiia) - Whether reliance upon presumption*

D

correct - Conduct of accused - Mens rea possession - Reasonable doubt - Dangerous Drugs Act 1952, s. 37(d), (da)

CRIMINAL PROCEDURE: *Trial - Dangerous Drugs Act 1952 - Drug trafficking - Prima facie case - Whether established at close of*

E

prosecution's case - Mens rea trafficking - Whether reliance upon presumption under s. 37(da)(iiia) correct - Conduct of accused - Mens rea possession - Reasonable doubt - Dangerous Drugs Act 1952, s. 37(d), (da)

CRIMINAL PROCEDURE: *Mens rea - Trafficking in dangerous*

F

drugs - Whether proven - Whether reliance upon presumption under s. 37(da)(iiia) Dangerous Drugs Act 1952 correct - Conduct of accused - Mens rea possession - Reasonable doubt - Dangerous Drugs Act 1952, s. 37(d), (da)

G

EVIDENCE: *Circumstantial evidence - Inferences from facts - Drug trafficking - Conduct of accused, admissibility of - Whether combined strength of facts and circumstances gave rise to strong inference that accused had mens rea possession of drugs - Evidence Act 1950, s. 8 - Dangerous Drugs Act 1952, s. 37(d)*

H

EVIDENCE: *Presumption - Drug trafficking - Whether prima facie case established at close of prosecution's case - Mens rea trafficking - Whether reliance upon presumption under s. 37(da)(iiia) Dangerous Drugs Act 1952 correct - Mens rea possession - Dangerous Drugs Act 1952,*

I

s. 37(d), (da)

The appellant was charged with two offences of trafficking in dangerous drugs (heroin and monoacetylmorphines) under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act'). Upon conclusion of the case for the prosecution, the High Court trial judge found that a *prima facie* case had been made out against the appellant on both charges and called upon him to enter his defence. He was satisfied that the appellant was in possession of the dangerous drugs and accordingly invoked the presumption of trafficking under s. 37(da)(iiia) of the Act. At the close of the defence case, the trial judge concluded that the defence was one of mere denial. However, at the conclusion of the trial and after hearing submissions from both parties, the trial judge substituted the two charges of trafficking to one charge of possession and sentenced the appellant accordingly. On appeal, the Court of Appeal set aside the whole decision of the trial judge and substituted it with a conviction under s. 39B(1)(a) of the Act, thereby imposing the mandatory death sentence upon the appellant. Hence, the present appeal by the appellant, in which he raised only one issue, namely, whether there was *mens rea* trafficking. It was alleged that the drugs were found in plastic bags, which showed that there was no *mens rea* trafficking and that the trial judge was thus wrong in relying on the presumption of trafficking under s. 37(da)(iiia) of the Act at the close of the prosecution's case. The appellant then attacked the judgment of the Court of Appeal on the ground that the judgment seemed to revolve around the appellant's conduct.

Held (dismissing the appeal)
Per Mohd Ghazali Yusoff FCJ delivering the judgment of the court:

(1) The conduct of the appellant in attempting to run away when one L/Kpl Chandran identified himself as "police" was relevant and admissible pursuant to s. 8 of the Evidence Act 1950 under the circumstances of the instant appeal. Such conduct was of course not to be taken in isolation but together with all the other circumstances of the case. That would be the correct approach to circumstantial evidence. *Chan Chwen Kong v. PP* (refd). (para 15)

(2) There was also no merit in the appellant's argument that since the drugs were found in plastic bags, this showed that there was no *mens rea* trafficking and that the trial judge was wrong in relying on the presumption of trafficking under s. 37(da)(iiia) of the Act at the conclusion of the case for the prosecution. (para 16)

(3) The evidence adduced by the prosecution showed that the appellant was clearly in possession of the plastic packages and that he had knowledge of its contents. He was in possession of a set of keys, one of which was used to open the boot of the motorcar in which the dangerous drugs were found. He was clearly aware of the packages and was in fact holding one of them when he was approached by the police and, consequently, attempted to run away. The combined strength of these facts and circumstances gave rise to a strong inference that the appellant had *mens rea* possession of the packages containing the drugs and that he had knowledge of the drugs. There was evidence of possession of the dangerous drugs independent of s. 37(d) of the Act. (para 17)

(4) The dangerous drugs as per the two charges were in excess of 15 grams respectively as provided under s. 37(da)(iiia) of the Act, which would trigger the statutory presumption of trafficking as provided in s. 37(da) of the Act. Premised upon these facts, the trial judge was correct in finding that a *prima facie* case had been made out against the appellant at the conclusion of the prosecution's case and calling upon him to enter his defence, which the trial judge subsequently found to be a mere denial. The Court of Appeal was also correct in substituting the trial judge's whole decision with a conviction under s. 39B(1)(a) of the Act in respect of both the original charges of trafficking since the appellant had failed to cast a reasonable doubt. There was thus no plausible reason to disturb the decision of the Court of Appeal. (paras 18, 19 & 20)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dituduh melakukan dua kesalahan mengedar dadah berbahaya (heroin dan monoacetylmorphines) di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Setelah kes pendakwaan tamat, hakim perbicaraan Mahkamah Tinggi mendapati bahawa suatu kes *prima facie* telah dibuktikan terhadap perayu

atas kedua-dua tuduhan dan telah memanggilnya untuk memasuki pembelaannya. Beliau berpuas hati bahawa perayu mempunyai milikan dadah berbahaya tersebut dan oleh yang demikian menggunakan anggapan mengedar di bawah s. 37(da)(iiia) Akta. Pada penghujung kes pembelaan, hakim perbicaraan memutuskan bahawa pembelaan itu hanyalah merupakan satu penafian. Walau bagaimanapun, pada kesudahan perbicaraan dan setelah mendengar hujahan-hujahan daripada kedua-dua pihak, hakim perbicaraan menggantikan kedua-dua tuduhan mengedar dengan satu tuduhan milikan dan telah menghukum perayu sewajarnya. Atas rayuan, Mahkamah Rayuan mengenepikan keseluruhan keputusan hakim perbicaraan dan menggantikannya dengan satu sabitan di bawah s. 39B(1)(a) Akta, dan dengan itu mengenakan hukuman mati ke atas perayu. Oleh itu, rayuan semasa oleh perayu, di mana beliau membangkitkan hanya satu isu, iaitu, sama ada terdapat *mens rea* mengedar. Ia telah didakwa bahawa dadah tersebut dijumpai dalam beg-beg plastik, yang membuktikan bahawa tiada *mens rea* mengedar dan bahawa hakim perbicaraan oleh itu telah khilaf apabila bergantung pada anggapan mengedar di bawah s. 37(da)(iiia) Akta pada penghujung kes pendakwaan. Perayu kemudiannya membidas penghakiman penghakiman Mahkamah Rayuan atas alasan bahawa penghakiman nampaknya berkisar pada kelakuan perayu.

Diputuskan (menolak rayuan)
Oleh Mohd Ghazali Yusoff HMP menyampaikan penghakiman mahkamah:

(1) Kelakuan perayu untuk cuba melarikan diri apabila seorang yang bernama L/Kpl Chandran mengenalkan dirinya sebagai "polis" adalah relevan dan boleh diterima mengikut s. 8 Akta Keterangan 1950 di bawah keadaan-keadaan rayuan semasa. Kelakuan sebegitu sememangnya tidak boleh diambil secara berasingan tetapi bersama-sama dengan semua keadaan-keadaan lain kes. Itu ialah pendekatan yang betul kepada keterangan ikut keadaan. *Chan Chwen Kong v. PP* (dirujuk).

(2) Tidak ada merit juga dalam hujahan perayu bahawa oleh kerana dadah tersebut dijumpai dalam beg-beg plastik, ini membuktikan bahawa tiada *mens rea* mengedar dan bahawa hakim perbicaraan khilaf apabila bergantung pada anggapan mengedar di bawah s. 37(da)(iiia) Akta pada penghujung kes pendakwaan.

(3) Keterangan yang dikemukakan oleh pendakwaan menunjukkan bahawa perayu jelas mempunyai milikan pakej-pakej plastik dan bahawa beliau mempunyai pengetahuan tentang kandungannya. Beliau memiliki satu set kunci, dari mana satu kunci digunakan untuk membuka but motokar di dalam mana dadah berbahaya dijumpai. Beliau jelas sedar akan pakej-pakej dan sebenarnya memegang salah satu pakej semasa beliau didekati oleh polis dan, oleh yang demikian, cuba melarikan diri. Kekukuhan bergabung fakta-fakta dan keadaan-keadaan membangkitkan inferens kuat bahawa perayu mempunyai *mens rea* milikan pakej-pakej yang mengandungi dadah tersebut dan bahawa beliau mempunyai pengetahuan tentang dadah tersebut. Terdapat keterangan milikan dadah berbahaya tersebut yang bebas dari s. 37(d) Akta.

(4) Dadah berbahaya dalam kedua-dua tuduhan melebihi 15 gram masing-masing seperti yang disediakan di bawah s. 37(da)(iiia) Akta, yang akan mencetus anggapan statutori mengedar seperti yang disediakan dalam s. 37(da) Akta. Berdasarkan fakta-fakta ini, hakim perbicaraan betul bila memutuskan bahawa suatu kes *prima facie* telah dibuktikan terhadap perayu pada penghujung kes pendakwaan dan memanggilnya untuk memasuki pembelaannya, yang mana hakim perbicaraan kemudiannya mendapati hanyalah sesuatu penafian. Mahkamah Rayuan juga betul apabila menggantikan keseluruhan keputusan hakim perbicaraan dengan satu sabitan di bawah s. 39B(1)(a) Akta berhubung dengan kedua-dua tuduhan asal mengedar disebabkan perayu telah gagal untuk menunjukkan keraguan munasabah. Oleh yang demikian tiada sebab-sebab munasabah untuk mengusik keputusan Mahkamah Rayuan.

Case(s) referred to:

Chan Chwen Kong v. PP [1962] 1 LNS 22 HC ***(refd)***
Chu Tak Fai v. PP [2006] 4 CLJ 931 FC ***(refd)***
Gunalan Ramachandaran & Ors v. PP [2004] 4 CLJ 551 CA ***(refd)***
Leong Bon Huat v. PP [1993] 3 CLJ 603 SC ***(refd)***
Samundee Devan Kerishnan Muthu v. PP [2009] 1 CLJ 498 CA ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 12(2), 37(d), (da)(iiia), 39A(1), 39B(1)(a), (2)
Evidence Act 1950, s. 8

For the appellant - Karpal Singh; M/s Karpal Singh & Co
For the respondent - Nurulhuda Nur'aini Mohd Noor DPP

[Appeal from Court of Appeal, Criminal Appeal No: B-05-39-05 & B-05-40-05]

[Editor's note: For the Court of Appeal judgment, please see Samundee Devan Kerishnan Muthu v. PP [2009] 1 CLJ 498.]

Reported by Suresh Nathan

JUDGMENT

Mohd Ghazali Yusoff FCJ:

[1] The appellant was charged with two offences of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and punishable under s. 39B(2) of the same. The first charge relates to 33.2 grammes of heroin and monoacetylmorphines (5.8 grammes of heroin and 27.4 grammes of monoacetylmorphines) and the second charge relates to 514.1 grammes of heroin and monoacetylmorphines (73.6 grammes of heroin and 440.5 grammes of monoacetylmorphines).

[2] The facts showed that on 2 April 1999 at 7.40am, acting on information in relation to a stolen motorcar, L/Kpl Chandran (PW7) and L/Kpl Appasamy from the Criminal Intelligence Unit, Police Headquarters, Petaling Jaya went to the car park of Flat C, Taman Petaling Utama, Petaling Jaya to investigate. Having identified the stolen motorcar and having noted that there was no one in the motorcar, they made an observation from a distance for about an hour and 40 minutes. Subsequently, they saw the appellant walking towards the motorcar. The appellant then stopped, looked around, opened the boot of the motorcar and took out a red plastic package and then closed the boot. PW7 together with L/Kpl Appasamy immediately rushed towards the appellant and PW7 identified himself as 'police'. The appellant looked shocked and pale and attempted to run away but was apprehended. PW7 seized the red plastic package from the appellant's hand and upon opening the package, found therein 140 small plastic packets each containing pinkish crystallite and powdery substance later analysed by the chemist to be heroin monoacetylmorphines. Upon searching the boot of the motorcar, they found four plastic packages and therein 1,648 small plastic

packets which also contained a similar pink crystallite and powdery substance also later analysed by the chemist to be heroin monoacetylmorphines.

[3] When the case for the prosecution was concluded, the learned trial judge of the High Court found that a *prima facie* case had been made out against the appellant on both charges of trafficking and hence called upon the appellant to enter on his defence. He was satisfied that the appellant was in possession of the dangerous drugs and accordingly invoked the presumption of trafficking under s. 37(da)(iiia) of the Act.

[4] The appellant elected to make a statement from the dock. He also called two witnesses, namely, his mother (DW1) and sister (DW2).

[5] At the close of the case for the defence the learned trial judge concluded that the defence was one of mere denial. He also found the evidence of DW1 and DW2 to be irrelevant as they were not present at the time of the arrest and nor did they know anything about the motorcar or the packages containing the dangerous drugs seized from the appellant by the police.

[6] However, at the conclusion of the trial and after hearing the submission of both the Deputy Public Prosecutor and counsel for the appellant, the learned trial judge amended the two charges of trafficking and substituted therewith to one of possession of 4.875 grammes of heroin and monoacetylmorphines under s. 12(2) of the Act punishable under s. 39A(1) of the same and sentenced the appellant to five years imprisonment and nine strokes of whipping.

[7] The learned trial judge made the decision that he did after concluding that the analysis carried out by the chemist (PW6) based on the small quantities of samples for the purpose of quantitative test was not sufficient, ie, he was dissatisfied with the small weight of the samples used by the chemist for analysis. In relation to this, the learned trial judge said in his grounds of judgment that he relied on *Leong Bon Huat v. Public Prosecutor* [1993] 3 CLJ 603 as a basis for his conclusion. In *Leong Bon Huat*, a conviction under s. 39B(1)(a) of the Act for trafficking in 793.85 grammes of cannabis was attacked on appeal on the ground that the testimony of the chemist did not prove beyond reasonable doubt that the bulk of the dried leaves was cannabis within the meaning of s. 2 of the Act. In that case, the chemist

testified "I did not obtain the weight of each sample taken but the total weight of samples taken for analysis was more than 10% of the net weight of 793.85g". In delivering the judgment of this court, Edgar Joseph Jr SCJ said (at pp. 605-606):

> What is necessary is that the testimony of the chemist upon such a matter must be clear and convincing.
>
> To take the point a little further, if by the expression 'more than 10% of the net weight of 793.85g' means a little more than 10% – and we think, in ordinary parlance, it would not be incorrect to say that it bears such a meaning – then, as a matter of simple arithmetic, the testimony of the chemist, at best, established that the appellant was in possession of a little more than 79.30g of cannabis, which would be well below the statutory minimum of 200g of cannabis required for the operation of the presumption of trafficking under s. 37(da) of the Act.
>
> Accordingly, we have no option but to allow the appeal, to quash the conviction for trafficking in cannabis, to set aside the sentence, and to substitute *in lieu* thereof, a conviction for possession of cannabis in contravention of s. 39A of the Act and a sentence of life imprisonment to take effect from the date of arrest, with the mandatory ten strokes of the rotan.

[8] On appeal by both the appellant and the Public Prosecutor in the instant appeal, the Court of Appeal allowed the appeal by the Public Prosecutor, set aside the whole decision of the learned trial judge and substituted it with a conviction under s. 39B(1)(a) of the Act and punishable under s. 39B(2) of the same in respect of both the original charges of trafficking. The Court of Appeal accordingly imposed the mandatory death sentence on the appellant under each of the original charges of trafficking.

[9] The appellant appealed to this court.

[10] In the judgment of the Court of Appeal in the instant appeal (since reported as *Samundee Devan Kerishnan Muthu v. PP* [2009] 1 CLJ 498), the court referred to its judgment in *Gunalan Ramachandaran & Ors v. PP* [2004] 4 CLJ 551 where it was decided that *Leong Bon Huat* did not lay down any general principle. In delivering the judgment of the court in *Gunalan*, Abdul Hamid Mohamad, JCA (as he then was) said (at p. 578):

> With greatest respect, I find that the judgment of the Supreme Court in that case is not an authority for saying that the law requires that 10% of the total weight of the drug must be tested. No reference was also made to *Public Prosecutor v. Lam San* ([1991] 3 MLJ 426). With respect, the judgment seems to focus on the interpretation of the words 'more than 10%' used by the chemist as if it is a statutory provision or a clause in a contract. The point is, there is no provision whatsoever in the Act which requires at least 10% of the total weight of the substance in question to be taken out for the purpose of analysis. As seen in *Public Prosecutor v. Lam San* ([1991] 3 MLJ 426), the 10% is nothing more that the practice among chemists.

The views of the learned judge above was accepted by this court in *Chu Tak Fai v. Public Prosecutor* [2006] 4 CLJ 931.

[11] In its judgment in the instant appeal, the Court of Appeal was of the view that the decision of the learned trial judge to amend both charges from trafficking in the dangerous drugs to one single charge of possession of the dangerous drugs was flawed.

[12] Before us, learned counsel for the appellant conceded that he has to accept the evidence of the chemist and hence did not pursue the above issue. He only raised one point, namely, whether there was *mens rea* trafficking. He pointed out that the dangerous drugs were found in plastic bags and this showed that there was no *mens rea* trafficking and thus the learned trial judge was wrong in relying on the presumption of trafficking under s. 37(da)(iiia) of the Act at the conclusion of the case for the prosecution. Counsel then attacked the judgment of the Court of Appeal on the ground that the judgment seems to revolve around the conduct of the appellant. In relation to this, he referred to pp. 506-507 of the judgment of the Court of Appeal where Abdul Malik Ishak JCA, in delivering the judgment of the court, dealt with the conduct of the appellant just before he was arrested as follows:

(a) 'the first conduct' – when the appellant stopped at the motorcar, he was seen "looking to the left, to the right and to the front and at the same time turning his head to the left and to the right";

(b) 'the second conduct' – when PW7 and L/Kpl Appasamy rushed to the appellant and PW7 introduced himself as 'police', the appellant "looked shocked and attempted to run away";

(c) 'the third conduct' – because of the squeaky noise made by the shoes worn by PW7 and L/Kpl Appasamy, the appellant saw PW7 and "looked surprised and his face turned pale". A

[13] We cannot see any merits in this argument. The learned judge was merely laying the factual matrix at the close of the prosecution's case based on the evidence adduced which also included the following: B

(a) that before the appellant opened the boot of the motorcar he was "behaving suspiciously"; C

(b) that the appellant had a set of keys and had used one of the keys to open the boot of the motorcar;

(c) that the appellant then took out a red plastic package inclusive of its contents and held it in his right hand and was seen walking away from the motorcar; D

(d) that when PW7 and L/Kpl Appasamy rushed toward the appellant and PW7 introduced himself as 'police', the appellant attempted to run away with the red plastic bag but was apprehended "and he behaved as per the second conduct and as per the third conduct"; E

(e) that when the appellant was asked to open the boot of the motorcar by the police, PW7 discovered four more plastic packages which contained the subject matter of the second charge. F

[14] Consequent to laying down the factual matrix discussed above, the learned judge of the Court of Appeal said: G

> Those were the facts and the circumstances of the case as adduced by the prosecution. We merely reproduce them without any addition or subtraction. Our approach is in accord with the decision of this court in *Basil bin Omar v. Public Prosecutor* [2003] 1 MLJ 192. Each of the conduct of the accused when taken separately may appear neutral but when taken together they gave rise to the inference that the accused was aware of the contents of the red plastic package that he was carrying in his right hand as well as the drugs that were found in the boot of the blue Honda Civic. We must not forget that when PW7 and his colleague went to the car park of Flat 'C', it was entirely based on the information pertaining to the theft of a stolen motor vehicle. No information was received in regard to a drug related H I

A offence. Both PW7 and his colleague must have least expected to arrest the accused for being in physical possession of the drugs. We are entitled to take into account the damning conduct of the accused before he was arrested.

B **[15]** We are also of the view that the contemporaneous conduct of the appellant in attempting to run away when PW7 identified himself as 'police' is relevant and admissible pursuant to s. 8 of the Evidence Act 1950 under the circumstances of the instant appeal. Such conduct is of course not to be taken in isolation but together with all the other circumstances of the case. That would C be the correct approach to circumstantial evidence (see *Chan Chwen Kong v. PP* [1962] 1 LNS 22).

[16] We also find no merits in the argument canvassed by learned counsel for the appellant that since the dangerous drugs were D found in plastic bags, this showed that there was no *mens rea* trafficking and thus the learned trial judge was wrong in relying on the presumption of trafficking under s. 37(da)(iiia) of the Act at the conclusion of the case for the prosecution.

E **[17]** We find that the evidence adduced by the prosecution before the learned trial judge showed that the appellant was clearly in possession of the plastic packages and that he had knowledge of the contents of the packages. The facts denote that the said dangerous drugs were in his custody and control. He was F in possession of a set of keys one of which was used to open the boot of the motorcar in which the dangerous drugs were found. He was clearly aware of the packages and was in fact holding one of the packages when he was approached by the police and consequently attempted to run away. The combined strength of G these facts and circumstances gave rise to a strong inference that the appellant had *mens rea* possession of the packages containing the dangerous drugs and he had knowledge of the dangerous drugs. There was evidence of possession of the dangerous drugs independent of s. 37(d) of the Act.

H **[18]** The dangerous drugs as per the two charges were in excess of 15 grammes respectively as provided under s. 37(da)(iiia) of the Act and this would trigger the statutory presumption of trafficking as provided in s. 37(da) of the Act. Premised upon these facts, the learned trial judge was correct in finding that a *prima facie* case I

has been made out against the appellant at the conclusion of the case for the prosecution on the two offences that he was charged with and calling upon him to enter on his defence. The learned trial judge found that the defence was a mere denial.

[19] The Court of Appeal found that the learned trial judge had erred in arriving at the whole of the decision and as a consequence had set aside his whole decision and substituted it with a conviction under s. 39B(1)(a) of the Act and punishable under s. 39B(2) of the same in respect of both of the original charges of trafficking and rightly so as the appellant failed to cast a reasonable doubt.

[20] As we find no plausible reason to disturb the decision of the Court of Appeal, this appeal is hereby dismissed. Conviction and sentence imposed on both charges are affirmed.